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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 1156

THE UNITED STATES OF AMERICA for the Use and Benefit of the Robertson Lumber Company, a Corporation,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY; U. S. FIRE INSURANCE COMPANY, Foreign Corporations,
Respondents.

BRIEF

In Resistance to Granting the Writ to the United States Court of Appeals for the Eighth Circuit.

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The principal question involved in this case, and indeed the only question involved in the case, is whether or not a supplier or material man has the right of recovery against a surety on a bond required under a so-called Capehart Act (Title 42, U. S. C., § 1594 (a)) construction contract where the material men or persons furnishing labor failed to comply with the terms of the bond as to notice. This Writ to review this action, which question has been answered in the negative by both the Eighth

and Tenth Circuits and by inference by this Court (in denying certiorari when this question was presented to it in 371 U. S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231) is being resisted on the following grounds:

1. There is no conflict on the question involved between the circuits or between the circuits and the state, and this question has been determined heretofore;

2. That the question is moot, anyway, because the Capehart Act is no longer operative; and

3. That the questions posed by the Petitioner are outside the scope of the issues of the instant case.

THERE IS NO CONFLICT ON THE QUESTION INVOLVED BETWEEN THE CIRCUITS OR BETWEEN THE CIRCUITS AND THE STATE, AND THIS QUESTION HAS BEEN DETERMINED HERETOFORE.

The question involved here in this case is the identical question which was posed in the case of **Continental Casualty v. U. S. for the Use of Robertson Lumber Company** (8th Cir. 1962), 305 F. 2d 794, cert. denied, 371 U. S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231. In that case, and in another case in which the point was considered and certiorari was denied by the Supreme Court at the same time (**Miles Lumber Co. et al. v. Harrison and Grimshaw Construction Co. et al.** (10th Cir. 1962), 305 F. 2d 363), the problem of dual notice was fully discussed and both of the Circuit Courts determined that such a notice was a mandatory requirement prior to recovery by a material man under the bond.

In the instant case, the material man who supplied the material under the identical bond failed to give dual notice. The trial court at the time the summary judgment dismissing this case as to the sureties was entered,

which has given rise to these appeals, clearly indicated that this case was identical to the first Robertson Lumber Company case (ibid.) and Miles Lumber case (ibid.) and other similar judicial determinations.

The Petitioner here seems by inference to assert that the determination of the court in this case and in the other cases cited is contrary to the determination of the same point by the Supreme Court of North Dakota (**Ireland Lumber Yard v. Progressive Contractors et al.** (N. D. 1963), 122 N. W. 2d 554). As Judge Register, the trial judge in the instant case, pointed out, however, a careful reading of that case would not lead one to the conclusion that they were differing with the Eighth Circuit in their determination that dual notice was a prior requirement; and, in fact, a careful reading of the case would seem to suggest that the Supreme Court of North Dakota was in complete agreement with the Eighth Circuit in the Robertson case (ibid.). Therefore, it is submitted that there is no difference between the Circuits or between any Circuit Court and the State Supreme Court that would give rise to a ground for granting this Petition under Supreme Court Rule 385 (a) or (b).

THAT THE QUESTION IS MOOT, ANYWAY, BECAUSE THE CAPEHART ACT IS NO LONGER OPERATIVE.

Following the default of the Hal B. Hayes contracting complex which gave rise to the first Robertson case (ibid.) and several other cases, the Congress of the United States made an extensive review of the problem of construction of housing for military personnel on military bases; and the result of this review was that the Capehart program was abandoned as a method of such construction as the governmental and public interests did not appear to be best served by its continuance. As a result, there are extremely few cases involving any phase of Capehart con-

struction still pending in the courts and when these are finally determined, there should be little likelihood for future litigation on this type of government contract bond.

THAT THE QUESTIONS POSED BY THE PETITIONER ARE OUTSIDE THE SCOPE OF THE ISSUES OF THE INSTANT CASE.

The two questions referred to the Petitioner's Petition suggest that a question for determination by the Supreme Court on certiorari is:

> "1. Do the courts of the several states have concurrent jurisdiction with the United States District Court in suits brought on bonds issued under the Capehart Act pursuant to Title 28, United States Code, Section 1352 (62 Stat. 934, June 25, 1948, ch. 646)?" (Petition, page 5.)

The Respondents to this Petition respectfully point out to the Court that this is the first time this question has been raised and the question is not material to the determination of the issues in the lawsuit. The Court will look in vain for any suggestion in the Record of this case that the jurisdiction of the Federal Courts or the State Courts are in question and that this jurisdiction of the State Courts or the Federal Courts has any bearing on the issue of whether or not a dual notice is required under the bond that the Petitioner originally sued under.

The second question asked is equally outside the scope of the issues here. The fact of the matter is that this point was quite well met by the trial judge, the Honorable George S. Register, in the opinion he handed down at the time he granted the motion of the Respondents here for summary judgment. He stated at that time that:

> "It appears to this court that the facts in the case now before it are dissimilar to those in Ireland's.

(The only case to which the Petitioners turn to as suggesting the state courts or the state law in North Dakota would give it any succor.) The bond here involved requires that, as a condition precedent to instituting suit or action, claimant must 'have given written notice or **any two** of the following: The Principal, any one of the Obligees, or the Sureties above named, * * *.' (Emphasis supplied.) Plaintiff has failed to do so—it is conceded the only notice given was to the principal. The notice provisions of the bond were not satisfied. Such failure precludes recovery under the bond."

This being the case, there can be no merit to the Petitioner's plea that this Court should answer these questions on this case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should not be granted.

Dated this 14th day of May, 1965.

Respectfully submitted,

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